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No. ~~91-1116~~

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In The

Supreme Court of the United States

October Term, 1992

JUANITA S. BROWN,

Petitioner,

vs.

INSHIRAH FARHOUD and GERMANTOWN MUTUAL INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the Wisconsin Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court lacks jurisdiction over the Petition for Writ of Certiorari due to petitioner Juanita S. Brown's (Brown) failure to properly raise the present constitutional claims in the state proceedings below?

PARTIES BELOW

The names of all parties to the proceedings in the Wisconsin Supreme Court appear in the caption of the case. Respondent Inshirah Farhoud (Farhoud) is an adult individual. Farhoud has no parent company or any subsidiaries. Respondent Germantown Mutual Insurance Company (Germantown) is a Wisconsin corporation duly organized and existing pursuant to the laws of the State of Wisconsin. Germantown does not have a parent company or any subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The Order from the Wisconsin Supreme Court denying Brown's Petition for Review is reproduced in the Appendix to the Petition for Writ of Certiorari at App. 1-3. The decision of the Wisconsin Court of Appeals denying Brown's motion to vacate the Wisconsin Court of Appeals' opinion filed February 2, 1992 is reproduced in the Appendix to the Petition for Writ of Certiorari at App. 4-9.

STATEMENT OF JURISDICTION

In the Petition for Writ of Certiorari, Brown alleges 28 U.S.C. § 1257(a) confers jurisdiction on this Court to review the judgment in question by Writ of Certiorari. However, at no time prior to the present Petition for Writ of Certiorari did Brown ever raise the issue of whether § 757.19(2)(g), Wis. Stats. violates the due process clause and/or the equal protection clause of the Fourteenth Amendment to the United States Constitution. Brown's other federal claims based upon the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution were never raised before the Wisconsin Court of Appeals in Brown's Motion to Vacate Court of Appeals' Opinion dated February 4, 1992. Thus, these claims were never considered or decided by the Wisconsin Court of Appeals or the Wisconsin Supreme Court below. As a result, this Court lacks jurisdiction over the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wis. Stats., § 757.19(2)(g):

> Disqualification of Judge. . . . (2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
>
> * * *
>
> (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

STATEMENT OF THE CASE

The present matter before the Court arises out of a personal injury action brought by Brown against Farhoud and Germantown for injuries sustained by Brown in a fall on Farhoud's premises. The case was originally tried to a jury and the jury returned a special verdict in favor of Brown, finding Farhoud 85% causally negligent and Brown 15% causally negligent. The jury awarded Brown the sum of $60,000 in damages for past and future pain, suffering and disability.

Farhoud and Germantown moved the trial court on motions after verdict for a change in the verdict on the questions of negligence and damages. The trial court denied their motion on the issue of negligence but granted their motion on the issue of damages. The trial court remitted the award for past and future pain, suffering and disability from the sum of $60,000 to the sum of $45,000 an amount which the court found to be reasonable as a matter of law. Brown was then given the option of accepting the reduced award or a new trial on the issue of damages, pursuant to § 805.15(6), Wis. Stats.

Brown decided not to accept the reduced award and opted for a new trial on the issue of damages. After the second trial, a jury

returned a special verdict awarding the sum of $10,000 as damages for past and future pain, suffering and disability. After the second trial, Brown, Farhoud and Germantown moved the trial court on motions after verdict for a change in the special verdict answers, with Brown requesting an increased award and Farhoud and Germantown requesting a reduced award. The trial court denied these motions and judgment was entered on the jury's verdict.

On February 25, 1991, Brown filed an appeal with the Wisconsin Court of Appeals. By opinion dated February 4, 1992, the Wisconsin Court of Appeals affirmed the trial court's decision to reduce the original award for pain and suffering from $60,000 to $45,000 and the trial court's denial of Brown's request for additur at the close of the second trial. At no time prior to or after filing the original appeal before the Wisconsin Court of Appeals did Brown's initial attorney, Gerald R. Turner, ever request that Judge Fine recuse himself pursuant to § 757.19(2)(g), Wis. Stats. At no time prior to the original appeal before the Wisconsin Court of Appeals did Attorney Turner, ever notify Farhoud and/or Germantown of the alleged "history" between Attorney Turner and Judge Fine.

After receiving the Wisconsin Court of Appeals' opinion dated February 4, 1992, Brown did not file a motion to reconsider nor did she file a Petition for Review with the Wisconsin Supreme Court pursuant to Wis. Stats., § 808.10; 809.62(1). Instead, on July 17, 1992, Brown filed a Motion to Vacate Court of Appeals' Opinion dated February 4, 1992. By opinion dated October 6, 1992 the Wisconsin Court of Appeals denied Brown's motion to vacate. On November 5, 1992, Brown filed a Petition for Review with the Wisconsin Supreme Court. On December 23, 1992, the Wisconsin Supreme Court ordered that Brown's petition be denied with Justice Shirley S. Abrahamson dissenting. The Wisconsin Supreme Court issued no opinion in ordering that Brown's petition be dismissed.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION TO ADDRESS BROWN'S CONSTITUTIONAL CLAIMS BECAUSE BROWN NEVER RAISED ANY CONSTITUTIONAL CLAIMS BEFORE THE WISCONSIN COURT OF APPEALS AND NEITHER THE WISCONSIN COURT OF APPEALS OR THE WISCONSIN SUPREME COURT ISSUED AN OPINION RELATING TO BROWN'S CONSTITUTIONAL CLAIMS.

It is a well established principle that this Court will not decide federal constitutional issues raised in this Court for the first time on review of state court decisions. *Webb v. Webb,* 451 U.S. 493, 496-97 (1981); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969); *Moore v. Illinois,* 408 U.S. 786, 799 (1972). In support of her motion to vacate the Wisconsin Court of Appeals' decision dated February 4, 1992, Brown raised the following arguments:

> 1. Judge Fine was required to exercise discretion pursuant to § 757.19(2)(g) to determine if he was impartial or if there was an appearance of partiality precluding him from participating in the original appeal of the underlying case;
>
> 2. Assuming Judge Fine did not exercise his discretion as required by § 757.19(2)(g), the Wisconsin Court of Appeals' decision dated February 4, 1992 was void; and
>
> 3. Even if Judge Fine determined he could act impartially pursuant to § 757.19(2)(g) his

> decision, as a matter of law, would be in error and his participation in the case would render the Wisconsin Court of Appeals' decision dated February 4, 1992 void.

Brown never raised the separate issue of whether Judge Fine's participation in the underlying case implicated the due process clause and/or equal protection clause of the Fourteenth Amendment to the United States Constitution. Brown did not request the Wisconsin Court of Appeals to apply an objective analysis to determine whether there was an appearance of partiality on the part of Judge Fine. Brown never asserted that § 757.19(2)(g), Wis. Stats. is unconstitutional. As a result, those issues were never decided by the Wisconsin Court of Appeals. The Wisconsin Court of Appeals denied Brown's motion to vacate. App. 4-7.

On November 5, 1992, Brown filed a Petition for Review of the Wisconsin Court of Appeals' decision to the Wisconsin Supreme Court. In Brown's petition before the Wisconsin Supreme Court, Brown argued review by that court was appropriate asserting Wisconsin law is presently ambiguous concerning the issue of judicial disqualification. Brown argued it is questionable, in the wake of the Wisconsin Supreme Court's decision in *State v. American TV and Appliance of Madison, Inc.*, 151 Wis. 2d 175, 443 N.W. 2d 662 (1989), whether Wisconsin law still allows an objective analysis under the due process clause in determining whether a judge should be disqualified in a certain case. Brown also argued, assuming an objective standard is still viable, that Wisconsin law is unclear as to what the objective standard is and whether Judge Fine's decision that he was impartial pursuant to § 757.19(2)(g), Wis. Stats. was wrong as a matter of law. In summary, Brown alleged review was appropriate in order to clarify what Brown characterized as "conflicting decisions" between the Wisconsin Court of Appeals and Wisconsin Supreme Court

relating to the issue of judicial disqualification. Brown never raised the argument that § 757.19(2)(g), Wis. Stats. is unconstitutional.

In response to Brown's Petition for Review before the Wisconsin Supreme Court, Farhoud and Germantown argued, in pertinent part, that Brown waived her right to raise the constitutional claims actually identified in Brown's Petition for Review for failure to raise these issues before the Wisconsin Court of Appeals. *See State v. Yellow Freight System, Inc.*, 101 Wis. 2d 142, 158, 303 N.W. 2d 834 (1981) (Wisconsin Supreme Court ". . . will not entertain a constitutional issue raised for the first time on appeal unless there is some compelling reasons for doing so".) The Wisconsin Supreme Court denied Brown's Petition for Review without issuing an opinion. Justice Shirley S. Abrahamson provided a lone dissenting opinion. App. 1-3. The Wisconsin Supreme Court did not address Brown's constitutional claims and, as of the date of this brief, has yet to address the constitutionality of § 757.19(2)(g).

On numerous occasions, this Court has stated that when "the highest State court has failed to pass upon a constitutional question, it will be assumed that the omission was due to want of proper presentation in the State courts, unless the aggrieved party in this court can affirmatively show the contrary." *Webb v. Webb, supra,* 451 U.S. at 496-97; *Street v. New York,* 394 U.S. 576, 582 (1969); *Bailey v. Anderson,* 326 U.S. 203, 206-07 (1945). Because Brown failed to properly raise her constitutional claims in the state proceedings below, and the Wisconsin Supreme Court did not rule on the federal issues raised by Brown in the Petition for Writ of Certiorari, this Court lacks jurisdiction over this case. *Webb. v. Webb., supra,* 451 U.S. at 501-02.

Moreover, this Court, pursuant to the doctrine of abstention, should refrain from entertaining jurisdiction in this case. The doctrine of abstention applies here since the Wisconsin Supreme

Court has yet to address the constitutionality of § 757.19(2)(g) and that statute may be construed by the Wisconsin Supreme Court in a manner that would avoid or modify the federal question presented here. *Zwickler v. Koota,* 389 U.S. 241, 248-49 (1967).

II.

BROWN WAS NOT DENIED HER CONSTITUTIONAL RIGHTS UNDER THE DUE PROCESS CLAUSE AND/OR EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE BROWN NEVER REQUESTED THE WISCONSIN COURT OF APPEALS TO APPLY AN OBJECTIVE ANALYSIS PURSUANT TO THE DUE PROCESS CLAUSE.

In Brown's Petition for Writ of Certiorari, she concedes, as she must, that under Wisconsin law there are two arguments a litigant may raise in seeking to have a judge disqualified due to concerns over the judge's partiality. A litigant may assert recusal is required under § 757.19(2)(g), Wis. Stats. The Wisconsin Supreme Court in *State v. American TV and Appliance, supra,* held the basis for judicial disqualification under § 757.19(2)(g) is a subjective one. Therefore, the determination of the "existence of a judge's actual or apparent inability to act impartially is for the judge to make." *State v. American TV and Appliance, supra,* 151 Wis. 2d at 183. A litigant may also assert that a judge must be disqualified on the grounds the judge's impartiality can reasonably be questioned. *State v. Walberg,* 109 Wis. 2d 96, 105, 325 N.W. 2d 687 (1982); *State v. Asfoor,* 75 Wis. 2d 411, 436, 239 N.W. 2d 529 (1977). Under Wisconsin law, whether a judge's impartiality can reasonably be questioned is a question of law for a reviewing court to determine. *State v. Rochelt,* 165 Wis. 2d 373, 379, 477 N.W. 2d 659 (Ct. App. 1991).

Brown's claim that the Wisconsin Court of Appeals and the Wisconsin Supreme Court denied Brown her constitutional rights ignores the fact that Brown never requested the Wisconsin Court of Appeals to undergo such an analysis in her Motion to Vacate the Court of Appeals' Opinion dated February 4, 1992. Brown simply did not avail herself of the arguments she now cites in the present petition.

Furthermore, this Court has stated that not "[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of . . ., personal bias, . . . would seem generally to be matters merely of legislative discretion." *Aetna Life Insurance Co. v. LaVoie*, 475 U.S. 813, 820 (1986); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *see also, FTC v. Cement Institute*, 333 U.S. 683, 702 (1948) ("[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level".) Under only two circumstances has this Court ever considered charges of judicial bias sufficient to rise to a constitutional level: Where the "judge has a direct, personal, substantial, pecuniary interest in the case before him", *Tumey, supra,* or where it is alleged the judge was influenced by generalized hostility towards certain kinds of businesses. *Aetna, supra. See Delvechio v. Illinois,* 494 U.S. 1062, 1063 (1990) (Marshall, J. dissenting). Since neither of these circumstances apply in the present case, Brown's due process claim and equal protection claim fail as a matter of law.

CONCLUSION

This Court must deny Brown's petition since Brown failed to properly raise the constitutional claims contained in the petition in the state proceedings below. Neither the Wisconsin Court of Appeals nor the Wisconsin Supreme Court addressed these constitutional claims. Therefore, this Court lacks jurisdiction over Brown's petition. *See Webb, supra.*

Furthermore, Brown's argument that she was denied her

constitutional rights under the due process clause and equal protection clause are unsupported. These claims were not addressed by the Wisconsin Court of Appeals or Wisconsin Supreme Court due to Brown's failure to properly raise them in her Motion to Vacate Court of Appeals' Opinion dated February 4, 1992. Moreover, the allegations of bias directed against Judge Fine are not of the type sufficient to rise to a constitutional level. *See LaVoie, supra; Tumey, supra.* Therefore, Brown's constitutional claims fail as a matter of law.

Certiorari should be denied.

Dated : April 20, 1992.

Respectfully submitted,

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